UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re

TRI VALLEY GROWERS,

Debtor. /

No. 00-44089 J11
Adv. No. 02-7336 AJ

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, as representative of Tri Valley Growers,

Plaintiff,

vs.

DORSEY & WHITNEY LLP,

Defendant. /

MEMORANDUM DECISION

This is an action by the Official Committee of Unsecured Creditors, as representative of the debtor's chapter 11 estate (the "Committee"), to avoid an alleged preference under Bankruptcy Code § 547(b)[1] received by Defendant Dorsey & Whitney LLP ("Dorsey"). After being served, Dorsey moved to dismiss the complaint herein.

[1]All further section references herein are to the Bankruptcy Code, 11 U.S.C. § 101 et. seq.

On May 13, 2003, this court issued its order denying Dorsey's motion. This Memorandum Decision sets forth the court's reasons for doing so.

Dorsey's motion alleges that the plaintiff herein, the Official Committee of Unsecured Creditors, acting as representative of the debtor's chapter 11 estate, lacks standing to commence and prosecute this action and that it must therefore be dismissed. The primary issue raised is whether the Supreme Court's decision in Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 120 S.Ct. 1942 (2000) precludes the Committee from prosecuting this action on behalf of the debtor's estate notwithstanding the fact that the Committee is acting pursuant to a final order of this court by which it was granted the authority to represent the estate in actions of this type. The court answers in the negative.

Section 547(b) provides, in relevant part, that "the trustee may avoid any transfer of an interest of the debtor in property" that meets the requirements of an avoidable preference, as thereinafter set forth. Section 323(a) provides "The trustee in a case under this title is the representative of the estate." Section 1107(a) provides, in relevant part, that subject to certain exceptions not relevant here, "a debtor in possession shall have all of the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter."

Because Tri Valley Growers is a debtor in possession, it follows from the foregoing provisions that it is the party vested under the Bankruptcy Code with the power and duty to prosecute

preference actions under § 547(b).

But that is not the end of the story. The question remains, can a debtor in possession, in which the Bankruptcy Code vests such power and authority, delegate it to an Official Committee of Unsecured Creditors? Prior to Hartford Underwriters, it had been well established in the Ninth Circuit that the answer to such question is "yes", at least in a case where the bankruptcy court has approved the delegation. See, e.g., In re Parmatex, Inc., 199 F.3d 1029 (9th Cir. 1999). In Parmatex, the court stated that such granting of derivative standing was appropriate when the trustee stipulated that the creditor's committee could sue on his behalf, and the court approved the stipulation. Id. at 1031. See also In re Suffola, Inc., 2 F.3d 977 n.1 (9th Cir. 1993); In re Spaulding Composites Co., Inc., 207 B.R. 899 (9th Cir. BAP 1997).

In Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 120 S. Ct. 1942 (2000), the Supreme Court held that because § 506(c) vests the right to seek a surcharge of a secured party's collateral exclusively in "the trustee," a party other than the trustee has no independent right to file an action seeking to surcharge a lienholder pursuant to § 506(c). Id. at 1951.

Hartford Underwriters is inapplicable here for several reasons. First, the Supreme Court expressly left open the question whether a bankruptcy court could "allow other interested parties to act in the trustee's stead in pursuing recovery under § 506(c)." Id. n.5. Thus, the issue raised by Dorsey's motion is not the issue that the

Supreme Court decided in Hartford Underwriters.[2] Indeed, after Hartford Underwriters, the Second Circuit held that a creditor could assert fraudulent transfer claims vested in the trustee under § 548(a), if: (a) the trustee consents, and (b) the court finds that the action is in the best interest of the estate and is necessary and beneficial to the efficient resolution of the bankruptcy proceedings. In re Housecraft Industries USA, Inc., 310 F.3d 64, 70 (2d Cir. 2002).[3]

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[2]Moreover, the considerations as to derivative standing under § 506(c) are not the same as the considerations under § 547(b). In the latter case, the proceeds of any recovery will go into the estate, the same result that would occur if the action were prosecuted by a trustee, whereas a recovery under § 506(c) by a party other than the trustee would pass "directly to the claimant with no gain to the estate." In re Debbie Reynolds Hotel & Casino, Inc., 255 F.3d 1061, 1067 (9th Cir. 2001) quoting In re Palomar Truck Corp., 951 F.2d 229, 232 (9th Cir. 1991). (Although Palomar's holding as to standing under § 506(c) was overruled by Hartford Underwriters, the court in Debbie Reynolds stated that the quoted language in Palomar survived Hartford Underwriters.)

Thus, even if a court could not confer standing on a party other than the trustee to bring an action based on § 506(c), it would not necessarily follow that the same result would be appropriate as to an action under § 547(b).

[3]In The Official Committee of Unsecured Creditors of Cybergenics Corporation v. Chinery, 304 F.3d 316 (3rd Cir.), reh'g en banc granted and opinion vacated, 310 F.3d 785 (3d. Cir. Nov. 18, 2002) the Third Circuit expressed a contrary view. On November 18, 2002, however, the court vacated its opinion to permit a rehearing en banc, which hearing was held February 19, 2003. In any event, the court's comments have no applicability here because the creditor's committee therein, unlike the

(continued...)

Second, on January 17, 2001, this court ordered, as an integral part of a compromise of controversy, that the Committee may represent the estate as to avoidance actions.[4] In consideration thereof, the Committee surrendered valuable rights. The court's order that approved that compromise is final. It is the law of the case, on which the Committee is entitled to rely, and by which all parties in interest are bound. As the Ninth Circuit has stated

> 'The 'law of the case' rule ordinarily precludes a court from re-examining an issue previously decided by the same court, or a higher appellate court, in the same case.' A decision on a factual or legal issue 'must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.'

Pit River Home & Agric. Coop. Ass'n. v. United States, 30 F.3d 1088, 1096-97 (9th Cir. 1994) (citations omitted). See also Moore v. Matthews & Co., 682 F.2d 830, 833-34 (9th Cir. 1982). As the Ninth Circuit explained, "The law of the case doctrine is a discretionary one created to maintain consistency and avoid reconsideration, during the course of a single continuing lawsuit, of those decisions that are intended to put a matter to rest." Pit River, 30 F.3d at

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[3](...continued)
Committee herein, never sought or obtained bankruptcy court authority to prosecute the action at issue therein.

[4]The facts relevant to the compromise are set forth in detail in a Memorandum (Not for Publication) filed August 31, 2001, in Growers' Committee v. TVG, Bankruptcy Appellate Panel no. NC-01-1085-RBK, pp. 2-6.

1097.

Here, the court has considered the issue of the Committee's standing in the context of a comprehensive settlement of a dispute in the main bankruptcy case, and the Committee has commenced numerous (more than two hundred) preference actions on behalf of the estate in reliance on that settlement. The court's order conferring standing on the Committee was intended to put the standing "matter to rest," and repeated argument of the same exact issue, in each adversary proceeding, would defeat consistency and serve no purpose. As a matter of discretion, the court believes application of the law of the case doctrine is appropriate here.

Dorsey correctly notes that an adversary proceeding is a proceeding separate from the main bankruptcy case, and argues that the law of the case doctrine therefore does not apply here, citing inter alia In re Philip Services (Delaware), Inc., 267 B.R. 62, 66-67 (Bankr. D. Del. 2001) and In re Fund for a Conservative Majority, 100 B.R. 307 (Bankr. E.D. Va. 1989).

The court disagrees. The foregoing decisions are not binding here, and are easily distinguished. In Philip Services, the debtor had stipulated with one of its creditors as part of a cash collateral motion in the main case, see § 363(c), that a certain guarantee debt would be an allowable claim against the estate. Philip Services, 267 B.R. at 16. Thereafter, the debtor commenced an action to recover a voidable preference against a different creditor, who argued that the debtor was not insolvent at the date of the transfer at issue, § 547(b)(3), because the guarantee debt

did not create a valid debt. Id. The bankruptcy court held that the ruling in the cash collateral proceeding did not bar the defendant in the adversary proceeding from arguing that the guarantee debt was invalid and that the debtor was therefore not insolvent at the date of the alleged avoidable transfer. Id. at 68-69.

Thus, in Philip Services, the issues in the two proceedings were not the same. Whether the guarantee debt should be an allowable claim against the estate is an issue separate and distinct from the issue of whether the debtor was solvent at the time of the alleged preferential transfer because the guarantee debt was not a valid debt at that time. Presumably, had the defendant in the adversary proceeding sought to disallow the guarantee debt as a claim against the estate, such would have been barred under the law of the case doctrine.

Fund for a Conservative Majority is also inapplicable. In Fund, the debtor sought to apply a ruling in an adversary proceeding, in which the U.S. Trustee was not a party, to the main case, in which the U.S. Trustee was a party. Fund, 100 B.R. at 308-09. Here, unlike Fund, the determination as to the Committee's standing to prosecute adversary proceedings was made in the main case, the broader forum, rather than the adversary proceeding, the narrower forum. Presumably, had this court conferred standing on the Committee in an adversary proceeding rather than the main case, then such determination would not have been the law of the case in a main case proceeding or a separate adversary proceeding.

The situation here is analogous to a court order in the main case appointing a chapter 11 trustee under § 1104(a). Once that order becomes final, the trustee need not repeatedly litigate his or her standing as a trustee in every adversary proceeding that the trustee thereafter files, or the propriety of the order appointing the trustee. Rather, under the law of the case doctrine, the matter of the trustee's standing as representative of the estate is decided for all purposes.[5]

Third, Dorsey's motion exalts form over substance. Clearly, the court could appoint the law firm representing the Committee herein to act as special counsel for the debtor. Section 327(e). And clearly, the court could authorize special counsel to consult with the Committee as to any business decisions regarding the prosecution of preference actions, rather than the management firm the estate employed to handle the debtor's affairs in this liquidating case.[6] Thus, the only thing that is different here is that the plaintiff portion of the caption box reads "Official Committee of Unsecured Creditors, as representative of Tri Valley Growers", rather than "Tri Valley Growers." The difference is

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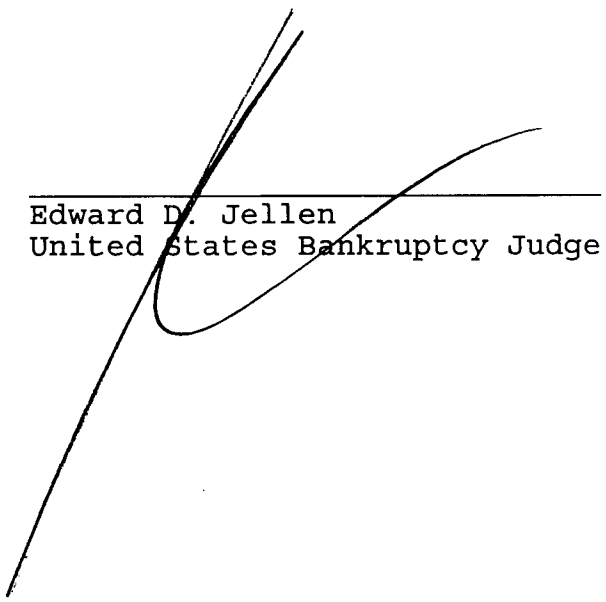
[5]The court acknowledges that some situations have resulted in confusion between the "law of the case" doctrine and the doctrine of stare decisis. See In re Staff Mortgage & Inv. Co. (Baida v. Wilke), 655 F.2d 967 (9th Cir. 1981); In re Staff Mortgage & Inv. Co. (Greiner v. Wilke), 625 F.2d 281 (9th Cir. 1980). Here, the same result follows under either doctrine.

[6]The debtor has ceased all operations, and has no economic interest in the outcome of this or any of the other adversary proceedings pending in this case.

irrelevant, and even if it were relevant, would not warrant dismissal on the merits.

For the foregoing reasons, the court has denied Dorsey's motion to dismiss this adversary proceeding.

Dated: May 14, 2003



Edward D. Jellen
United States Bankruptcy Judge

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